

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIN WARREN SIZEMORE,

Defendant.

Case No. 6:21-cr-00138-RAW-1

TENTH MOTION IN LIMINE

Defendant Devin Sizemore, by and through his assigned counsel, and pursuant to Local Criminal Rule 12.1(E), moves this Court for an order precluding Government's Exhibits 58 and 59, Medical Examiner photographs of Emily Sizemore. The government did not previously disclose either photograph. Defense counsel first saw the photographs after obtaining the government's exhibit binder on March 31, 2023.

This Court should grant this motion because any probative value of the photographs is substantially outweighed by their prejudicial effect. The photographs, apparently taken by the Medical Examiner, depict Emily Sizemore hours after her death. They appear to graphically depict a pathological diagnoses in the autopsy report that Emily Sizemore's cause of death was drowning. More specifically, the photographs appear

depict the “white froth and foam cone noted in the oral and nasal cavities” noted in the autopsy report.¹ Mr. Sizemore does not contest that Emily Sizemore’s cause of death was drowning. Nor does he contest the presence of “white froth and foam cone” during the autopsy. Even if the photographs tended to answer a contested question in this case (which they do not), any probative value is substantially outweighed by the prejudicial effect. They are gratuitous and undignified. Accordingly, allowing the jury to view these photographs would only serve to inflame their passions and “lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

March 31, 2023

Respectfully submitted,

/s/

Lisa A. Peebles
Federal Public Defender
4 Clinton Square, 3rd Floor
Syracuse, NY 13202
(315) 701-0080
Lisa_Peebles@fd.org

¹ Perhaps not surprisingly, the government does not seek to introduce photographs corroborating the presence of “[b]ilateral, heavy edematous lungs . . . [c]ombined lung weight, 246 grams,” which is the other pathological diagnoses supporting drowning. That is probably because viewing Emily’s lungs would not be expected to play on the jury’s passions.

Certificate of Electronic Filing and Service

This is to certify that on this 31st day of March, 2023, I caused the foregoing instrument to be filed with the Clerk of the Court using the ECF System for filing, with electronic service to be made via CM/ECF to Lisa Man, AUSA, and Gerald Collins, AUSA. To counsel's knowledge, there are no non-ECF registrants who are counsel in this case.

/s/

Lisa A. Peebles
Federal Public Defender